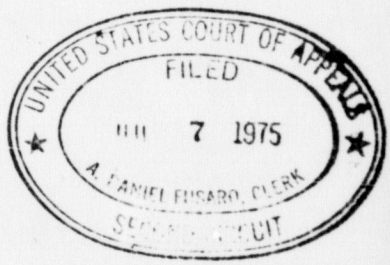
United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

74-2107

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



GEORGE RIOS, EUGENE C. JENKINS, ERIC O. LEWIS and WYLIE B. RUTLEDGE,
Plaintiffs-Appellees,
-and-
JOHN GUNTHER, CHARLES T. FARRELL, FRANK MONTANARO, HUGH DONNEGAN, ROBERT McMILLION, MICHAEL LONIGRO and ANTHONY BORELLI, each of them individually and on behalf of all other persons, etc.,
Applicants to Intervene-Appellants,
-against-
ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL UNION #638 of U.A., MECHANICAL CONTRACTORS ASSOCIATION OF NEW YORK, INC. and the JOINT STEAMFITTING APPRENTICESHIP COMMITTEE OF THE STEAMFITTERS' INDUSTRY EDUCATIONAL FUND,
Defendants-Appellees.

UNITED STATES OF AMERICA (Equal Employment Opportunity Commission,
Plaintiff-Appellee,
-and-
JOHN GUNTHER, CHARLES T. FARRELL, FRANK MONTANARO, HUGH DONNEGAN, ROBERT McMILLION, MICHAEL LONIGRO and ANTHONY BORELLI, each of them individually and on behalf of all other persons, etc.,
Applicants-to Intervene-Appellants,
-against-
ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL UNION #638 of U.A., et al.,
Defendants-Appellees.

PETITION FOR REHEARING

BURTON H. HALL
Attorney for Applicants to Intervene-Appellants
401 Broadway
New York, N.Y., 10013
(212) 431-9114

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GEORGE RIOS, et al.

Plaintiffs-Appellees,

Docket
No. 74-2107

-and-

JOHN GUNTHER, et al., etc.,

Applicants to Intervene-Appellants,

-against-

ENTERPRISE ASSOCIATION, etc., et al.,

Defendants-Appellees.

UNITED STATES OF AMERICA (Equal Employment Opportunity Commission)

Plaintiff-Appellee,

-and-

JOHN GUNTHER, et al., etc.,

Applicants to Intervene-Appellants,

-against-

ENTERPRISE ASSOCIATION, etc., et al.,

Defendants-Appellees.

PETITION FOR REHEARING

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, Applicants to Intervene-Appellants, John Gunther, et

al., hereby petition for rehearing of the decision of this Court entered on June 24, 1975, affirming (but on different grounds) an order of the United States District Court for the Southern District of New York which denied their application for intervention of right.

Statement of the Case

The district court, after lengthy trial and consideration of a suit brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq., handed down an exhaustive Order and Judgment on June 21, 1973, regulating all phases of the process of admission to membership in the A Branch of defendant Local 638. As regards direct admission of already-qualified steamfitters, it provided in paragraph 12 of that Order, that following a three-month period in which only minority-group applicants would be admitted, "whites" as well as "non-whites" on a one-for-one basis. In a subsequent order of November 15, 1973, it extended the initial three-month period to the end of 1973 but provided that, following the end of the year, all "other persons" (i.e., all non-minority-group persons) seeking admission to membership could request application forms and such request would entitle them to be tested and processed for admission to membership in the order that their applications were submitted, subject to certain priority rights of minority-group applicants.

Subsequently, on March 29, 1974, the district court adopted an Affirmative Action Plan which provided, inter alia, that applicants should be admitted if they meet certain residency, skill, experience and non-criminal conditions and, specifically, provided that each applicant, including all persons who had requested applicants under the prior orders, would be scheduled for the Court Approved test of his skills upon verification of his other qualifications and payment of a filing fee.

The district court denied application made by appellants, non-minority-group applicants for membership in the A Branch, for intervention of right on grounds of untimeliness. This Court affirmed but upon an entirely different ground that did not appear in the district court's opinion and was not briefed or argued on appeal (it was not raised at all until appellants' time on oral argument had expired). That different ground was that, under this Court's reading of the Affirmative Action Plan and other, prior orders of the district court, it was not the district court's intent to bring non-minority-group applicants for membership within the reach of its remedial and protective orders. This Court viewed the district court's intent as being aimed, so far as non-minority-group persons are concerned, only at preventing informal admission of some of them to membership and not at extending protection to those of them who were or had been denied admission. On that view, the Court rules that appellants have no significantly protectable interest in the

judicial proceedings.

Reason for Granting Rehearing

In its examination of the Affirmative Action Plan adopted by the district court, this Court overlooked a passage that had been inserted (between parentheses) into the second sentence of paragraph 17 of that Plan for the specific and deliberate purpose of extending the Plan's protection to non-minority-group applicants for membership as well as to minority-group applicants. The passage is, of course, easy to overlook; all the more so because its meaning and purpose do not become clear until one examines the provisions of prior orders referred to by it -- or until one examines the transcripts of the conference in which it was determined by the district court to insert the parenthetical passage into paragraph 17. But by overlooking it, and by examining paragraphs 15 and 16 of the Plan in virtual isolation from paragraph 17, the Court misapprehended the intent of the Affirmative Action Plan as regards non-minority-group applicants for membership. This Petition is aimed at correcting that misapprehension.

Paragraphs 15 and 16 of the Affirmative Action Plan (quoted in footnote 2 of this Court's Opinion, at page 4356, Slip Opinion, and set forth at pages 402-41a of the Joint Appendix) provide for non-discrimination in admission into the

Union. and provide (para. 16) that applicants "shall" be admitted if they meet certain conditions as to residency, non-criminality, experience, and completion of a Court Approved Practical Examination or test.

Paragraph 17, in its first sentence, provides that forms for applying for membership may be obtained by request to the Union.* The second sentence of Paragraph 17 provides as follows (emphasis added):

> "Each applicant (including all persons who, prior to the effective date hereof, requested an application form from Local 638 for A Branch membership pursuant to paragraph 12 of the Order and Judgment herein dated June 21, 1973 and the Order herein dated November 15, 1973) will be scheduled for the Court Approved Practical Examination upon verification of his qualifications as set forth above in sub-paragraphs (a), (b) and (c) of paragraph 16, and upon payment of a Practical Examination filing fee of $25 or such different amount as may be fixed by the Administrator."

The two references in the parenthetical clause -- to paragraph 12 of the original Order and Judgment of June 21, 1973 and to the Order of November 15, 1973 -- reveal that the "all persons" embraced therein were intended to include the class of "All other persons" described in the second paragraph of the November 15, 1973 Order (see: J.A. 38a-39a) or, more simply, were intended to include all non-minority-group persons who,

* Paragraph 17 can be found at page 41a of the Joint Appendix.

pursuant to the two orders, had requested application forms from the Union.*

When paragraphs 15 and 16 of the Affirmative Action Plan are read together with paragraph 17, the district court's intent to create a substantive and significantly protectable right in all persons, whites as well as non-whites, who had made appropriate request for application forms, becomes clear. The right so created does not extend to a guarantee of admission to membership. It does extend, however, to testing and processing for admission to membership. Every person who has made a request in writing to the Union for an application form in accordance with the prior orders is guaranteed the right, upon

* Paragraph 12 of the June 21, 1973 Order and Judgment (J.A. 37a) provides for admission of whites and nonw-whites to membership following expiration of the initial three-month period. (The initial period, in which only non-whites were to be admitted, is governed by paragraph 11.) Since the reference is to paragraph 12 rather than 11, the requests for forms described in the parenthetical clause would appear to be post-initial-period requests made by whites as well as non-whites.

The November 15, 1973 Order consists of two paragraphs. The first paragraph says nothing about requests: it deals with non-whites whose applications were submitted during the initial period. The second paragraph deals with "All other persons who request, or have requested, application forms ... for A Branch membership ...." and provides that they "shall promptly be provided such forms and shall be tested and processed ... in the order in which their applications are submitted...," subject to certain priority rights. (Emphasis added)

Since the reference to the November 15, 1973 Order has to do with requests for forms, it is clearly directed to the second of the two paragraphs that comprise that Order (.i.e., to the "All other persons...." (See: J.A. 38a-39a.)

verification of his meeting the residency, non-criminality and experience requirements, and upon payment of the filing fee, to be scheduled for the Court Approved Practical Examination.

Actual admission to membership was made subject to a potential obstacle: namely, the fixing of temporary ratios for admission of new members during periods of unemployment; see: paragraph 26, J.A. 44a-45a. That paragraph empowers the Union, with the approval of the Administrator, to slow down entry under certain employment conditions.* But the Court very seriously errs (see: Slip Opinion, page 4360) when it interprets paragraph 26 as negating the rights created by paragraphs 15, 16 and 17. It was not even intended to limit or delay exercise of those rights so far as they relate to testing and processing of applications for membership; it was intended only as an emergency protection againsttoo sudden an inflow of new members in relation to employment opportunities.

That the intent of the Affirmative Action Plan, and of the prior orders of the district court, was in fact to create such rights in all persons, whites as well as non-whites, who had made

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* Applicants to Intervene contend that the proviso which paragraph 26 places upon the right of applicants to actual admission is improper and unlawful, because it is based upon and designed to effectuate Local 638's unlawful assertion of power to "protect" A Branch members by discriminating against non-members. Applicants interest in opposing, on these grounds, any implementation of paragraph 26 is itself a "significantly protectable interest" and a separate basis for intervention of right.

request for application forms, is rendered obvious by an examination of the transcript of the conference of March 15, 1974, in which the Court suggested, and then directed, the insertion of the parenthetical clause into the second sentence of paragraph 17 of the Affirmative Action Plan.*

That transcript, which is part of the record of the court below and part of the record on appeal in Docket No. 74-1593, is available to the Court.

The conference reveals that prior to that conference Mr. Shaw, representing certain employers, had written to the Court proposing that their be provision in the Affirmative Action Plan for those men who, pursuant to the November 21, 1973 Order, had written to the Union for application forms. At the conference, Mr. Shaw, referring to his letter, argued that such men "are entitled to take the examination" (page 7). The Court twice (pages 9 and 10) described the point as "well taken." And it was in

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* As the material in the Joint Appendix on this appeal indicates, the district court had, even before entry of the June 21, 1973 Order and Judgment, expressed its intent (and the intent of the Order and Judgment) to protect white applicants for membership as well as non-whites. (See: J.A. 173a-175a) Responding to the suggestion that "the door should be open to everyone who is qualified," the district court commented, "Listening to you gentlemen talk, I think I find that you all really agree that these transitory admissions shouldn't be limited to minorities as I had originally drawn it here." (J.A. 173a) Judge Bonsal then proposed a program "in two phases," being a rough version of the program later set out in paragraphs 11 and 12 of the June 21, 1973 Order and Judgment. It was agreed that such a program "would certainly make a good deal of sense" in terms of opening the door to all, whites and nonwhites. (J.A. 173a-174a.)

response to that point that the Court proposed insertion of the parenthetical clause into paragraph 17. Said the Court (at page 9):

> "THE COURT: What I was going to suggest, and I think it should cover the point -- I think the point is well taken -- if on the third line, after 'Each applicant' put '(including all persons who, prior to the effective date hereof, requested an application form from Local 638 for A Branch membership pursuant to paragraph 12 of the Order and Judgment herein dated June 21, 1973 and the Order herein dated November 15, 1973)' will be scheduled and so forth.
>
> "Wouldn't that do it?"

Mr. Shaw (page 9) and Mr. Harris (page 10), the latter representing the government, agreed that that "does it." What they meant is made clear by the ensuing discussion between the Court and the Administrator, Mr. McDonnell (page 11):

> "MR. MC DONNELL: Let me see if I understand where we are. What is really being said here with respect to what Mr. Harris was talking about, Section 12 in the June 21st order, with respect to that you are now saying that those persons who have applied who are non-black and Spanish speaking, but did apply prior to the date of this order, will be tested?
>
> "THE COURT: I am saying that each applicant who is given an opportunity to get a blank under the prior orders will be scheduled for a practical examination.
>
> "MR. MC DONNELL: What of those who were not given an application?
>
> "THE COURT: They come in . They can make application for admission in the form approved by the Administrator. ..."

Mr. Harris commented that some of the people who had written for application blanks had received them and some had not;

he observed" "Anyone who wrote in would be covered by this language. That is the way it reads" (page 12). Mr. Shaw and the Court responded:

> "MR. SHAW: Yes, and that is the way the November order directed, that upon anybody requesting application he was to be furnished it.
>
> "THE COURT: Right. I think that would be all right."

The appellants here, Applicants to Intervene, are among the persons who were intended to be covered by the insertion of the parenthetical clause into paragraph 17. They are persons who, prior to the effective date of the Affirmative Action Plan, requested an application form from Local 638 for A Branch membership pursuant to paragraph 12 of the June 21, 1973 Order and the November 15, 1973 Order (J.A. 9a-10a, 11a-13a, 126a-127a). As such, they are entitled to be scheduled for the Court Approved Practical Examination upon verification of their qualifications as set forth in paragraph 16, paragraphs (a), (b) and (c), and upon payment of the filing fee. If they pass the test and meet the requirements, they are entitled to be admitted to membership, subject to any effectuation of the powers set forth in paragraph 26.

These are valuable and "significantly protectable" rights. They establish a real, material interest in the judicial proceeding. The Applicants should be allowed to intervene of right

in order to protect that interest.

Despite its denial of intervention, the court below did not intend to exclude applicants for membership in Local 638 who are neither non-white nor Spanish-surnamed from the rights created by its remedial orders. Quite the contrary: it expressly sought to extend the rights to be processed and tested for membership to all persons who had requested application forms, whether white or non-white, minority-group or non-minority-group. This Court, however, has by its ruling rejected that intent. This Court's ruling states in effect that persons who are non-minority-group (neither non-white nor Spanish-surnamed) have no rights that the Plan Administrator (or anyone else) is required to respect so far as the district court's remedial orders are concerned, regardless of how many times, and how properly, they have requested application forms for membership in the A Branch. The Court's ruling is not only wrong; it is dangerously harmful to all parties. It should be reconsidered.

CONCLUSION

For all the foregoing reasons, the undersigned requests that rehearing be granted.

Dated: July 7, 1975

Respectfully submitted,

BURTON H. HALL
Attorney for Applicants-Appellants

CERTIFICATE OF SERVICE

I, BURTON H. HALL, hereby certify that wo copies of then foregoing Petition for Rehearing have been served this day via first-class prepaid mail upon counsel of record for each of the parties herein.

Dated: July 7, 1975

Burton H. Hall
401 Broadway
New York, N.Y., 10013